

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
ROUVIERE, et al., : Docket #18-cv-04814  
 : LJL-SDA  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 DEPUY ORTHOPAEDICS, INC., et al., : New York, New York  
 : April 28, 2021  
 Defendants. :  
 : TELEPHONE CONFERENCE  
 ----- :

PROCEEDINGS BEFORE  
THE HONORABLE JUDGE STEWART D. AARON,  
UNITED STATES MAGISTRATE JUDGE

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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HONORABLE STEWART D. AARON (THE COURT): Good afternoon. This is Magistrate Judge Aaron. This is the matter Rouviere against Howmedica Osteonics Corp. et al, 18-cv-4714. This line is being recorded. If I could have the parties identify themselves, please, starting with the plaintiffs?

MS. MELISSA VISCONTI: Good afternoon, your Honor. Melissa Damian Visconti and Andre Rouviere on behalf of the plaintiffs. Ms. Rouviere, one of the plaintiffs, is also on the line.

MR. PAUL ASFENDIS: Good afternoon, Paul Asfendis for defendant, Howmedica Osteonics Corp.

MR. JOEL T. LARSON, JR.: Good afternoon. This is J.T. Larson from Barnes & Thornburg on behalf of Depuy Orthopaedics, Inc.

MR. JOSEPH G. EATON: Joe Eaton on behalf of Depuy Orthopaedics, Inc.

THE COURT: Thank you. Good afternoon.

The purpose of this call is to address the plaintiff's motion filed on March the 31st at ECF 287. In that motion plaintiffs are seeking to modify the Scheduling Order to permit the submission of supplemental expert reports and also to sanction Howmedica for alleged discovery misconduct. I have reviewed the parties'

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1 submission, and I have a few questions for the plaintiffs,  
2 a few questions for the defendants, and then I was going to  
3 open the floor up, first, to the plaintiffs for them to  
4 waive any issues they wish to raise or emphasize any issues  
5 they wish to emphasize, again, keeping in mind that I have  
6 read everything that's been submitted. And then I'll open  
7 the floor to each of the defendants for whatever comments  
8 they wish to make with the same understanding that they --  
9 no one should feel like they need to say something that's  
10 in the papers because I've reviewed everything.

12 So first for the plaintiffs -- and every time I  
13 hear a beep that it sounds like somebody is leaving the  
14 line, I just want to be sure that -- Ms. Visconti, are you  
15 still on with us?

16 MS. VISCONTI: I am, yes.

17 THE COURT: All right, and I still have counsel  
18 for both defendants still on the line, am I right?

19 SEVERAL: Yes, your Honor.

20 THE COURT: Okay, so for the plaintiffs, are you  
21 claiming that Howmedica acted intentionally in withholding  
22 material information from you?

23 MS. VISCONTI: Well, they certainly knew they had  
24 the information, and they certainly intentionally did not  
25 tell us. If you're asking whether I am arguing that they

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2 did that for some nefarious purpose, I simply just can't  
3 get into their heads. But did they knowingly obtain  
4 materials without telling us and knowingly hold onto them  
5 for over a year without telling the plaintiff? Yes,  
6 certainly.

7 Is that your question? I'm not sure I -- go  
8 ahead.

9 THE COURT: Yes. And I'm going to obviously ask a  
10 similar question to Howmedica. But before I do that, are  
11 you claiming that Depuy did anything wrong here, whether  
12 intentional or not, vis-à-vis these slides, these recuts?

13 MS. VISCONTI: So I don't know that Depuy  
14 intentionally did anything wrong here. It looks -- again,  
15 I don't know what's in their heads, but they should have  
16 informed Howmedica, when they provided Howmedica a copy of  
17 their authorization, that there was an obligation to  
18 provide everyone a copy of whatever it was that they  
19 obtained. Was that intentional or an oversight? I  
20 honestly -- that's not really the point that we're trying  
21 to make here. I don't know.

22 THE COURT: Well, so Depuy, when they received the  
23 information from Baptist Hospital, they immediately sent a  
24 link to both Mr. Rouviere as well as counsel for Howmedica.  
25 So I guess I'm having difficulty understanding -- and maybe

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you can enlighten me -- as to why it is that you think Depuy is at fault.

MS. VISCONTI: Okay, wait. I want to make sure that I'm understanding here. So, really, our argument is that HOC is at fault here, right, that HOC, who used Depuy's authorization or Depuy's law firm's authorization to obtain these records. So, really, what we're saying is if anyone's at fault here, it's HOC.

Now, Depuy permitted it to happen. I don't know that Depuy understood the extent of what happened. It is Depuy's claim -- and I have absolutely no reason to believe that it's not true -- that they did not know that HOC had actually obtained materials. And I believe what you're referring to is, yes, at various points the Rouvieres were made aware, certainly, of correspondence with the hospitals. But on the particular correspondence we're talking about that's relevant here, they were -- what it tells us is recuts were available, right, not HOC has requested and obtained three slides, you know, on such-and-such a date and they were sent to this law firm. That, nobody knows. Depuy doesn't claim that they knew it, we certainly didn't know it. The only thing we possibly could have known, based on the documents that HOC is submitting, is there were -- recuts could have been requested, and you

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2 could have paid \$35 to get them.

3 THE COURT: And the plaintiffs never asked for  
4 them, right, from Baptist Hospital?

5 MS. VISCONTI: The plaintiffs did not request --  
6 we didn't know -- correct, we did not ask for more recuts  
7 to be done. The plaintiffs were aware of the original  
8 slides. Those were the first cuts. All the plaintiffs  
9 were aware was that there was this block of tissue that  
10 remained there. And, yes, it's -- of course, everyone  
11 knows it's possible or should have known that it was  
12 possible to go back and say, "Hey, you know, we think that  
13 there's a need for more cuts." We didn't ask for those  
14 because we had three slides. We were not aware that any  
15 others had been done, and we didn't initiate a process to  
16 get more slides.

17 THE COURT: But plaintiffs were aware that they  
18 could have, is that fair?

19 MS. VISCONTI: Sure. I mean, were they actually  
20 aware? You know, I think at a certain point they were,  
21 sure. They're not denying that they should have known that  
22 there was the possibility to go back and ask for more  
23 recuts if they wanted them.

24 THE COURT: Okay. So for the defendants -- and  
25 I'll leave it to, you know, whether -- Howmedica or Depuy



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or perhaps both can answer this question for me, because I've been studying the events of late October 2019 and early November 2019. So piecing together what happened here, a paralegal from Gibbons P.C., if I'm pronouncing her name correctly, Sheva Konsari, on October the 28th, 2019, sends a fax to the hospital, Baptist Hospital, and says, "Thank you for speaking with me on Friday. As per our conversation, attached is an authorization to obtain tissue samples from the 11/11/16 and 2/16/17 surgeries. Please let me know if you need anything else." And that fax, which is attached as part of ECF 287-1, the first page of it in the upper left-hand corner says page 1 of 4. And then as part of ECF 287-1, there's only three pages from that fax that are included.

And then what comes next that's relevant to the issue before me is that on October 31st, 2019, three days later, Baptist Hospital doesn't send a fax to Sheva Konsari but rather responds directly to Barnes & Thornburg, who's counsel for Depuy, and says, "Further to your fax dated October 28, 2019," and it wasn't Depuy's fax or Barnes & Thornburg's fax; it was in fact Gibbons' fax, it was somebody from Gibbons.

So piecing it together, what I surmise is that the missing page from that fax was the May 2019 letter that was

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1 sent -- that existed from Barnes & Thornburg; it's at  
2 ECF 291-2 at page 10. There's a To Whom It May Concern  
3 letter from Laura Wolverton, a paralegal at Barnes &  
4 Thornburg, to the Keeper of Records at Baptist Hospital.  
5 And the person at Baptist Hospital looked at who had  
6 sent -- under whose cover the authorization was sent and  
7 therefore sent the October 31 response, again, not to  
8 Howmedica's counsel but instead to Depuy's counsel. I'd  
9 like the lawyers for both Howmedica and Depuy to comment on  
10 what I just said and tell me whether they think I got it  
11 right; and if not, how I got it wrong. And, again, I leave  
12 it to whoever wants to speak first.  
13

14 MR. ASFENDIS: I suppose I'll go first. This is  
15 Paul Asfendis for Howmedica. And so thanks for the  
16 opportunity. And I guess just to your point, also, because  
17 it's about this issue, the plaintiffs have made an  
18 allegation here that we have done something. And  
19 Ms. Visconti says she doesn't know whether it's nefarious.  
20 But if you read their papers, they say it's nefarious, and  
21 they say that we did something that was underhanded. And,  
22 Judge, it is complete, completely, categorically false.

23 And so what I also want to mention is plaintiffs,  
24 when they represented in their reply papers that we,  
25 Howmedica, somehow went rogue and did this and didn't even

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1 tell Depuy we were doing it, that was known to be false by  
2 the plaintiffs when they said it because there's an earlier  
3 email from Depuy's counsel to the plaintiffs' counsel  
4 explaining that, yes, we knew they were using the  
5 authorization to get records. We might not have known or  
6 confirmed that they finally got those slides, the pathology  
7 slides, but we knew they were using it.

9 And, you know, I don't know how much -- there is a  
10 history here -- I don't know how much you want to hear;  
11 but, I guess just relevant to what you had said, this was  
12 not something where we just went on our own and reached  
13 out. We had said, you know, we think we should probably  
14 get the pathology slides, so our paralegal contacted  
15 Ms. Wolverton and said, you know, would you like us to make  
16 the reach-out, because we'd like to get the slides. And  
17 every step of the way, every communication with Baptist  
18 Hospital was -- they were kept apprised.

19 Now, you know, so as far as the actual confirming,  
20 yes, they arrived at our office, no, that did not happen.  
21 But there's nothing underhanded about that. We just --  
22 this was an expedient way to get the pathology slides  
23 because we didn't yet have an authorization from the  
24 plaintiffs. We had -- there was no dispute that we were  
25 entitled to those same records, to the same slides. There

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2 was never an objection to providing the authorization. I  
3 think there was a miscommunication about getting that  
4 authorization to us.

5 I just heard a tone, so I don't know if somebody  
6 dropped off, but unless I'm --

7 THE COURT: Well, let's just, again, just to be  
8 sure, do I still have plaintiffs' counsel on the line?

9 MS. VISCONTI: Yes, sir.

10 MR. ANDRE ROUVIERE: Yes, sir.

11 THE COURT: All right, and do we still have  
12 Depuy's counsel on the line?

13 MR. LARSON: Yes, your Honor, yes.

14 THE COURT: Okay. So please continue.

15 MR. ASFENDIS: Okay, and so basically, there's  
16 this history here. And there's no question this is not a  
17 privacy issue. It never has been about privacy or HIPAA,  
18 which was mentioned in the latest, in the reply brief,  
19 which is a -- they mention a regulation that provides to  
20 healthcare providers, not to defendants in a litigation.  
21 But plaintiffs themselves sent me personally a flash drive  
22 with thousands [indiscernible] records on them, medical  
23 records, a lot of them duplicative of the records we're  
24 talking about from Baptist Hospital.

25 And so there's no issue here as far as privacy. I

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2	don't believe there is an issue, that it should be an issue	
3	as far as what Depuy knew or did not know. I only mention	
4	this because you asked the question and because the	
5	plaintiffs have made this allegation that we somehow went	
6	on our own and did this and went rogue. And it is not	
7	true.	

8 THE COURT: Okay. I --

9 MR. ASFENDIS: So I have a lot more to --

10 THE COURT: No, I just want to go back to my --  
11 and I heard everything you said, and I want to go back to  
12 my specific question; and that is do you believe that my  
13 surmise that the fourth page of that fax that was sent to  
14 Baptist Hospital enclosing the authorization had with it  
15 the May 19 letter, and therefore, that's why Baptist  
16 Hospital sent the response to Ms. Wolverton, who was the  
17 one who signed that transmittal letter?

18 MR. ASFENDIS: Oh, yes, I believe --

19 THE COURT: And --

20 MR. ASFENDIS: -- that is true. Yes -- I'm sorry.

21 THE COURT: Go ahead.

22 MR. ASFENDIS: I was going to say I believe that  
23 is accurate. I think when our -- you know, the paralegal  
24 at my office sends the authorization, she sent it with the  
25 initial -- with Depuy's letter. We had asked Ms. Wolverton

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2 to send us the letter and the authorization because Baptist  
3 wanted it.  
4 THE COURT: Okay. And let me ask Depuy's counsel:  
5 Do you have a similar belief or understanding as to that's  
6 what transpired?  
7 MR. LARSON: Your Honor, to answer your question  
8 regarding the one-page directly, I do believe that that was  
9 Ms. Wolverton, the May 10th or May -- release that was that  
10 one page that's missing from that document. I don't have a  
11 broader response to everything that Mr. Asfendis discussed,  
12 but I'm happy to discuss it, if you'd like.  
13 THE COURT: Well, I don't think so. Obviously,  
14 I'm happy to hear whatever else each party would like to  
15 say. So I'm going to give each party an opportunity to do  
16 that.  
17 But let me ask Howmedica this question. Exactly  
18 why did you not produce the recut slides, the ones that  
19 were received after you got -- you got this November 7,  
20 2019, invoice that said path \$105, and then it says, "The  
21 slides will be released on receipt of your check in the  
22 amount of \$105." That was sent to Sheva Konsari. So you  
23 then got the recuts, and I know they were kept somewhere in  
24 the offices of Gibbons. Please state for me, clarify for  
25 me exactly why you did not produce those recut slides to

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1 the plaintiffs when you received them -- or to Depuy, for  
2 that matter.

3  
4 MR. ASFENDIS: Yes, Judge, it honestly didn't  
5 cross my mind because there's no obligation that I'm aware  
6 of to disclose that or to produce them because all the  
7 parties were aware that there was this -- the Baptist, you  
8 know, said here's how much the slides cost and you can get  
9 them. Any party could have gotten them. We know  
10 plaintiffs got their own set. They got the originals and  
11 certainly didn't supplement anything or disclose anything  
12 until they decided to use them and we found out in their  
13 expert reports. And so that's why. There was no  
14 obligation that I was aware of to do it. We were just  
15 covering our bases, getting the slides because it's always  
16 been our practice to just -- you know, if there's something  
17 there, you get it in case of need. I didn't know that it  
18 would be needed. I frankly didn't, you know, think it was  
19 likely that it would be; but why not get the slides? And  
20 so that's why we didn't disclose them because I was not  
21 aware of no obligation to do so.

22 Even Depuy's agreement with the plaintiff, I know  
23 Depuy was circulating, of course, records anytime they came  
24 in, the paper records, they were giving courtesy copies.  
25 And to me, that's a lot different because we knew you can't

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1 give a courtesy copy of slides. You can just make the  
2 parties aware that they're available. Anybody can get  
3 them. We got our own. We understood that they were  
4 duplicates. Plaintiffs had the originals; they certainly  
5 didn't say anything to anybody. And that was it. And so  
6 that's why, Judge; it was nothing certainly nefarious, not  
7 trying to hide anything. There was no point to. We  
8 certainly hadn't made any -- had been reviewed or had any  
9 decision or considered using them in the case. It was just  
10 getting them to have them in case of need at some point.

11  
12 THE COURT: So Ms. Konsari received these slides  
13 and files them away. Like, were these -- did she come and  
14 say, "Hey, I got these slides; what should I do with them?"  
15 Or what --

16 MR. ASFENDIS: I think --

17 THE COURT: -- what do you remember about what  
18 transpired upon receipt by Ms. Konsari of these slides?

19 MR. ASFENDIS: I think that was it. My  
20 recollection is that, that basically, hey, the slides came  
21 in. I said okay, you know, we'll keep them where you  
22 normally keep anything, in a secure cabinet by her desk.  
23 And, I mean, honestly, that was it. That was what  
24 transpired, and I didn't give it much thought, if at all,  
25 frankly, after that.



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1 Again, we understood -- we had the understanding  
2 that we had just obtained duplicate slides that, you know,  
3 weren't necessarily going to be used or just it was a  
4 matter of covering bases to get everything and that there  
5 was no obligation to tell anybody. I didn't expect the  
6 plaintiffs to tell us that they had the originals. I'm not  
7 saying that they did anything wrong by doing it. I'm only  
8 pointing out the fact that they didn't tell us is not that  
9 they did something wrong but it's that they did the same  
10 thing. So that's why I'm having a little trouble here, you  
11 know. I'm definitely being accused by the plaintiffs of  
12 having done something underhanded or not disclosed. Well,  
13 neither did they. And that's okay because I don't think  
14 they had an obligation to do it. And they had the  
15 originals, Judge. So that's, you know, a long-winded  
16 answer, but I hope that answers your question.

18 THE COURT: Okay. So let me ask plaintiffs'  
19 counsel, Ms. Visconti, I'm not soliciting additional  
20 argument, but I did want to give each party, as I  
21 indicated, an opportunity to make any -- emphasize any  
22 points that they wished to emphasize. So, Ms. Visconti,  
23 I'll have you go first.

24 MS. VISCONTI: Sure. Thank you, your Honor.

25 So, again, as I've said throughout our papers and

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1 I say here again today, we're not coming in here and saying  
2 this was a big conspiracy or a big plot. I don't even know  
3 if it was intentional. What I'm saying is they had an  
4 obligation to disclose that they had obtained these  
5 tissues, and they didn't do it. Now, was it intentional?  
6 Were they hiding it? Or was it negligence? At best, it's  
7 negligence. Okay?

8 But I think it's important for the Court to  
9 understand that, you know, you just asked, okay, when the  
10 slides came in, did Ms. Konsari -- you know, but you know,  
11 hey, the slides are here; I'm going to stick them in this  
12 locked cabinet. And the response was most likely. Right?  
13 Don't forget that while they were in possession of these  
14 slides, Dr. Gannon was deposed and asked a ton of questions  
15 about what specimens he had reviewed. So they're thinking,  
16 right, it's out there, that there's specimens out there and  
17 Dr. Gannon has reviewed them. Then there's a hearing where  
18 they protest that we will not send the slides, the original  
19 slides that we disclosed to them that we had because we  
20 disclosed Dr. Gannon's report within, like, a week of us  
21 getting them. Okay? So there's no -- we didn't get slides  
22 and not tell them about them. Our, you know, the  
23 plaintiffs obtained the original slides, provided them to  
24 their expert, their expert prepared a report and indicated  
25

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1 that he had relied on these slides and that -- he  
2 discloses, right after we get the slides -- it's not like  
3 we're hiding them in a drawer [indiscernible due to barking  
4 dog]. Right? And as soon as he discloses them, the  
5 defendants start pushing to get access to those slides.  
6 And there's actually a hearing about it, about how they  
7 should be able to review the same specimens that we did.  
8

9 So, again, it was on everybody's mind that these  
10 slides -- that we're having this whole discussion about  
11 access to slides. How they failed to have the lightbulb go  
12 off and remember that they had other slides sitting in a  
13 drawer and not tell us is a little bit -- we'll just say,  
14 you know, it goes to that negligence at best that I'm  
15 saying.

16 I would also just make sure -- you know, you were  
17 asking what -- I believe that Mr. Asfendis stated he didn't  
18 think that there was any obligation to tell anybody, he  
19 just didn't think of it. And that's what we're really  
20 talking about in our reports here. Even if they had not  
21 decided to actually use them so that they would have to be  
22 disclosed in their initial disclosures, there were several  
23 discovery requests that these would have fallen within.  
24 They had them for a year and never updated or supplemented  
25 the responses to their discovery requests to indicate that

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1 they had them.

2           So, you know, I don't think that the issue here is  
3 was there some nefarious plan to hide evidence. I think  
4 the issue here is they obtained material relevant --  
5 materials here and didn't tell anybody about them. I'm  
6 putting aside how they went about it. You know, it isn't  
7 okay to use somebody else's authorization -- but I'm  
8 putting that aside. The fact is not how they got them; the  
9 fact is they obtained material evidence and failed to tell  
10 anybody about it. And that evidence, as it turns out,  
11 happens to be, again, material; and that's really why we're  
12 here.

13           We're here for two reasons. One, we want to make  
14 sure that nobody's going to object if Dr. Gannon, our  
15 expert, wants to opine and discuss what it is that he saw  
16 in these slides. In an abundance of caution, we considered  
17 that to be potentially a new opinion, which you know we're  
18 sensitive about because we've already run into this issue  
19 about, you know, the allegation that we disclosed expert  
20 opinions after the deadline. So we want to make sure that  
21 [indiscernible] can talk about and discuss and opine  
22 regarding this information without objection. Does that  
23 require modification of the Scheduling Order to permit them  
24 to do so? We were doing that in an abundance of caution.  
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Both defendants claim that there's nothing different or new here, so possibly what we're requesting is possibly moot because -- as far as that first thing that we're requesting -- because they're saying there's nothing new here. So if that's the case, we should be permitted to let Dr. Gannon opine regarding what he saw on these slides, and then any other experts to also discuss how Dr. Gannon's opinion, you know, just opine based on all of that information. And if they're not going to object, again, the first part of our request here may very well be moot. Maybe we don't need to modify the Scheduling Order.

But, secondly, there is the absolute clear violation of discovery obligations. The sanctions are mandatory. We're here because we couldn't --

THE COURT: Well, let me just push back on the sanctions are mandatory. So you're relying upon 37(c)(1), and 37(c)(1), the mandatory part says, If a party fail -- and I'm not reading all of the words because I'm leaving out words that aren't necessary -- if a party fails to provide information as required by Rule 26(a) or (e), the party is not allowed to use that information to supply evidence on a motion, at a hearing or a trial unless the failure was substantially justified or harmless. It then goes on, in addition to or instead of this sanction, the

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1 Court on motion after giving an opportunity to be heard, A,  
2 may order payment of the reasonable expenses, including  
3 attorney's fees caused by the failure -- I'm going to skip  
4 B, which is informing the jury -- and, C, may impose other  
5 appropriate sanctions. So where is it in Rule 37(c) that  
6 it's mandatory that I sanction -- assuming you're right,  
7 assuming there's been some sort of violation of the  
8 rules -- that it's mandatory that I sanction Howmedica?

9 MS. VISCONTI: So, under the first provision that  
10 you read of (c)(1), it is mandatory that there is a  
11 sanction. Normally, that sanction would be, as you said,  
12 that they would not be able to use the discovery material  
13 that's at issue. The "may" part, I would submit, is if  
14 that original sanction doesn't fit, if it's not a fitting  
15 sanction for what happened, then the Court may, in place of  
16 that original option, use monetary sanctions or some other  
17 appropriate sanction.

18 What's happening here is we are not arguing that  
19 because they did not disclose this evidence, they,  
20 Howmedica, should not be permitted to use this evidence.  
21 That is not a fitting sanction for what happened here. So  
22 we are asking the Court you then can use your discretion to  
23 go into, to dip into the "may" and replace the original  
24 mandatory sanction with a more fitting sanction, which we  
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1 would submit would be both monetary because we're here  
2 because they would not agree to just let us supplement  
3 these reports and do what needed to be done as a result of  
4 their discovery violations. And, frankly, you know, one  
5 thing that the defendants are concerned about -- and I  
6 think it's as valid concern -- we need to go back and now  
7 revisit this whole -- these pending motions regarding the  
8 exclusion of an expert on the grounds that the expert  
9 didn't find evidence or didn't opine, you know, didn't give  
10 opinions based on a lack of evidence that we now are  
11 telling you are in these specimens that have been sitting  
12 in that locked cabinet for a year. So there --

14 THE COURT: All right, so, Ms. Visconti, I'm going  
15 to bring you back to my question. It sounds like you're in  
16 agreement with me it is not mandatory that I impose  
17 sanctions on Howmedica is prefatory; it is -- the word is  
18 "may," I may do that but I am not required to do that. Do  
19 you agree?

20 MS. VISCONTI: Not entirely, your Honor. It is  
21 mandatory that sanctions are imposed; it's just that the  
22 sanctions that are mandatory don't fit. So, yes, then I  
23 would say it may, the Court may impose alternative  
24 sanctions. So I sort of agreement, but other than that  
25 very first part.

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1  
2 THE COURT: Okay. Again, you and I may be looking  
3 at different rules. It says in addition to or instead of  
4 the sanction, I may impose money and other sanctions. So  
5 it's "in addition to or instead of."

6 MS. VISCONTI: "Or instead of," correct. I'm  
7 focusing on the "instead of," right.

8 THE COURT: Right. But it's "may." What I'm  
9 quarreling with you about is you're telling me I'm required  
10 to do this, and I don't see a rules-based -- how that  
11 position is rules based. I'm a stickler to the rules. I  
12 follow the rules; I'm a rule follower, which is good, given  
13 the position I'm in, because I'm required to follow the  
14 rules. And I want to follow the rules, and I'm not seeing  
15 anything that makes it mandatory on me to impose sanctions  
16 here. And it doesn't sound like you're citing me to  
17 anything that says I'm wrong.

18 MS. VISCONTI: So I'm pulling this back up. So my  
19 point is that the only mandatory part -- I think we're in  
20 agreement here; we're only splitting up at the end. I  
21 think we're in agreement, but under (c)(1), the party --  
22 it's mandatory that the party would not be able to use the  
23 information or evidence at issue unless the failure is  
24 substantially justified or harmless, right. I think we  
25 agree that that's a mandatory provision. I'm saying that



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1 the "in addition to or instead of" the sanction language,  
2 I'm asking the Court to interpret it as the Court has the  
3 discretion to replace the sanction that is not fitting, the  
4 mandatory sanction which doesn't fit. It's your --  
5 absolutely your discretion to then impose an alternative  
6 sanction, which is in the rest of, you know, (1)(a), right.

7 THE COURT: And I agree with you about that.  
8 Again, I was just questioning the mandatory piece.

9 Okay, so what else -- obviously, again, I've read  
10 your papers; I've read everyone's papers. So this is a  
11 message to all of you: Don't feel you need to repeat  
12 what's in your papers. But, Ms. Visconti, before I turn  
13 the floor over to Howmedica, do you have anything else?

14 MS. VISCONTI: No, your Honor. Thank you. I  
15 think we say it all in our papers.

16 THE COURT: Okay. So, again, Howmedica's counsel,  
17 I obviously want to give you an opportunity to emphasize  
18 whatever you want to emphasize. But please keep in mind  
19 that I have read the papers. But go ahead.

20 MR. ASFENDIS: Okay, so I will be brief, then,  
21 because some of these issues are addressed in the papers.  
22 I know the first one that Ms. Visconti raised was  
23 Dr. Gannon. You know, his report, he had used the original  
24 slides, which again had not been disclosed up to that  
25

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point. But, anyway, he had used those original slides.

The motion practice that came out of that, as you know, Judge, was whether -- it wasn't -- there's no dispute whether we should all be working off of the same slides; it was the dispute as to plaintiff wanted to send them, Mr. Rouviere wanted to send them right to our expert, who hadn't even been disclosed yet. He refused to send them to our office. And that was all that was about. So this whole notion that, oh, we should have said something about recuts since. The recuts weren't even in the case. The recuts are duplicates. And those slides that Dr. Gannon reviewed, photographed, referred to specifically, those were the slides in the case, which again had not been disclosed.

And so the second thing that Ms. Visconti said as far as there's all these discovery requests that would have encompassed these slides -- and I'm not seeing them, and I've been through their discovery requests in preparation for this motion, and I still don't see them. And I never thought I -- [indiscernible] -- but am I missing something? And they said no. If you want pathology specimens, you ask for pathology specimens. There are a bunch of vague, overbroad requests, most of them that say, you know -- that end with if -- you know, that you intend to use at trial;

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1 but other ones that are just vague and overbroad that would  
2 require us not just to produce slides but to reproduce  
3 every single, you know, medical record regarding any of the  
4 surgeries. And we objected to those at the time, and that  
5 is just overbroad. I don't know of any document requests  
6 that -- valid document requests that would encompass these  
7 slides.  
8

9 And so that leaves us with the Rule 26  
10 disclosures. And, again, those disclosures are, you know,  
11 it's not -- you don't disclose every single thing that may  
12 be relevant. It's that you may use in support of your  
13 claims or defenses. And I won't repeat myself too many  
14 times, but that was something that obviously had not  
15 been -- had not been considered. So there's that. I  
16 don't --

17 THE COURT: Let me ask you this. And, again, I'm  
18 using ellipses here -- but there is a document request that  
19 asks for any materials that evidence or document  
20 plaintiff's hip surgeries. Doesn't that encompass the  
21 recuts?

22 MR. ASFENDIS: That's the one that I was referring  
23 to as wildly -- vague and wildly overbroad. Could it? I  
24 suppose. But it could encompass a lot of things that are  
25 not intended by it. It could encompass -- it would

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1 encompass all -- we would have to reproduce all of her  
2 records. What I suspect and what I think is not  
3 unreasonable is that that request was not asking for -- was  
4 probably asking for records that we would have had through  
5 our sales representatives who were at the surgery. That's  
6 just my speculation, but reading that request, you know,  
7 "would evidence the surgeries," I -- reading that and  
8 giving them the benefit of the doubt, it's still wildly  
9 overbroad. And in some worlds could it encompass, you  
10 know, pathology slides? Sure. And it could also encompass  
11 a lot of other things that we wouldn't be required to be  
12 reproducing or producing to plaintiffs. It just doesn't  
13 make sense in that context to me. But that's the one that  
14 I mentioned when I said that it was vague and overbroad.

15  
16 THE COURT: Okay.

17 MR. ASFENDIS: As far as --

18 THE COURT: All right --

19 MR. ASFENDIS: Yeah, and I won't be too much  
20 longer, but I do -- as far as the whole sanctions question,  
21 again, there are some elements that have to be met. And  
22 none of them are met, in my opinion. But obligation to  
23 timely produce I don't think is there. Culpable state of  
24 mind, so in other words, knew that we were doing something  
25 wrong or violating rules, it's obviously not there. And

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1 the, quote/unquote, "missing evidence would be relevant to  
2 a party's claim or defense," and, again, that comes back to  
3 this issue. These slides are duplicates, for all intents  
4 and purposes.  
5

6           There is nothing in this case that the plaintiffs  
7 have put forth, other than really Ms. Visconti's lawyer's  
8 arguments in the reply to say, well, you know, could slides  
9 possibly be different; yeah, you know, it's possible. But  
10 that's -- if you look at Dr. Nelson's declaration -- I'm  
11 sure you have -- it's highly unlikely. Recuts are the  
12 standard of care in the medical field. This is what  
13 facilities rely on when -- you know, they don't send out  
14 originals for clinical second review; they send out recuts.

15           And so in this case it's ironic but I think the  
16 best evidence of the sameness of these -- the recuts to the  
17 original is the defendants' own supplemental report. And,  
18 again, you know, I know your Honor's aware of it, so I  
19 won't repeat the point, but plaintiffs say that -- you  
20 know, he just says in his letter responding to us that, you  
21 know, basically, sorry about this unfortunate mix-up. I  
22 don't know what that means. Plaintiffs' counsel says in  
23 their reply that it's just illustrative, that the photos  
24 are just illustrative. But it's more than just a mix-up.  
25 He didn't just use the wrong photos; he claimed those

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1 photos of original slides to be the recuts. And even more,  
2 he didn't just attach them as illustrative; he actually  
3 specifically referred to those photos of the originals and  
4 pointed out specific characteristics in those photos of the  
5 tissue to show his, quote/unquote, "new findings." And,  
6 you know, if there's a question about any mix-up, he even  
7 color-coded those photos to show exactly where on those  
8 photos the major differences were. And the whole time he  
9 was using the same slides from the first report. So it is  
10 completely a bogus report. This is more than just a mix-  
11 up. You know, the biggest piece of evidence, the biggest  
12 difference, significant difference to him was this one  
13 photograph of all this, you know, large titanium debris.  
14 And he used the photo of the original slides to show that  
15 new, quote/unquote, "new" metal titanium debris. But it  
16 was always there. That was -- that photo was from his  
17 original report.

18  
19       So I don't want -- I don't think we should get  
20 lost, lose the big picture out of this. All of this is  
21 complete nonsense. And plaintiffs' other experts, they  
22 don't even respond or address the concerns about the other  
23 experts in their reply. These experts knew about these  
24 issues. They say that they would have done something  
25 different, and they wouldn't have. They were all aware.

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1 And I'm not going to, you know, repeat the substantive  
2 arguments, but I will point out that those were not  
3 addressed on the reply. And I think that's -- that is  
4 significant.

5 And, you know, I'll end it there, but if you have  
6 any specific questions in addition to what you've already  
7 asked, but this is not a case where discovery should be  
8 reopened in any way. And there's certainly no basis for a  
9 sanction award. So thank you for the time.

10 THE COURT: All right, lastly, again, I am not  
11 soliciting but want to give an opportunity for Depuy's  
12 counsel to emphasize any points that they wish to  
13 emphasize.

14 MR. LARSON: Thank you, your Honor. This is J.T.  
15 I will be very brief. I just wanted to say plaintiffs'  
16 motion -- and Ms. Visconti just went over this -- there are  
17 four distinct forms of relief that they're requesting.  
18 They want to serve a supplemental pathology report from  
19 Dr. Gannon; they want to possibly change unspecified  
20 deposition testimony from the pathology of Dr. Gannon; and  
21 then what I want to focus on, they want to serve a  
22 supplemental report from a disqualified expert who's been  
23 disqualified for conflicts of interest in this case and/or  
24 from Dr. Jerrell. And that's the point that I want to  
25

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focus on just here at the end because it hasn't been addressed in this.

Plaintiffs have to show good cause, your Honor, for each form of relief that they're requesting in this motion. They've kind of taken this broad, sweeping proposition that if they can show good cause for anything, then each expert should be able to opine again on how this changes their opinions. And that's just simply not how Rule 16 works.

I'm not going to address everything; that's been done in our papers, your Honor. But I would just like to briefly address the engineering. Plaintiffs brush over this point. As Mr. Asfendis just said, they don't really address it in their reply. Ms. Visconti barely mentioned it today at oral argument. But we all understand what's going on here with the pretext and the desire to redo expert engineering opinions as it relates to Depuy and failure to warn. For the last six months plaintiffs have been trying to reopen expert discovery and fix what they perceive as an error and give failure-to-warn opinions as they relate to Depuy. To do that here, based on this new, these discovered recuts, the disqualified expert and Dr. Jerrell have simply just said, yeah, my opinions would have been different had I seen this supplemental report.



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1 That is unsupportable for at least two reasons that we  
2 address in the papers and I'll just briefly state here.  
3 The disqualified expert and Dr. Jerrell did not review  
4 Dr. Gannon's original report. It is simply disingenuous to  
5 say that if opinions had been slightly different in the  
6 pathologist's report, my opinions would have been different  
7 when you didn't review the pathologist's original report.  
8 And, second, nothing in Dr. Gannon's supplemental report  
9 would have affected the disqualified expert because she was  
10 fully aware of these issues. We've shown this in our  
11 opposition brief, your Honor, which thank you for allowing  
12 us to submit that one -- it was overlong. But we've  
13 addressed this at great length. The disqualified expert  
14 was fully aware of the component impingement that took  
15 place between the titanium stem and the cobalt chromium  
16 shell, and he took pictures of the component impingements,  
17 he stated in his brief that it was, quote, "very clear."  
18 He measured the gouge in the titanium stem itself. He knew  
19 it was titanium alloy. He knew the -- he measured the  
20 gouge and the volume of debris that was released. It is  
21 not believable that anything in the supplemental report  
22 would have changed his opinions.

24 And, finally, your Honor, we respectfully request  
25 that you look at this in light of the previous arguments

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1 that plaintiffs have made to you over the last six months.  
2 At first plaintiffs told you that the disqualified expert  
3 actually did give opinions raised for failure to warn  
4 related to Depuy. When that was rejected, plaintiffs told  
5 the Court that the disqualified expert only failed, you  
6 know, to give failure-to-warn opinions because he was  
7 secretly conflicted by Depuy. And now the plaintiffs right  
8 now are reversing all of this and telling you that they've  
9 been continuing to work with the disqualified expert behind  
10 the scenes and now he can be trusted when he says his  
11 opinions would have been different and he would have given  
12 probably -- they haven't given us the supplemental report  
13 yet -- but presumably, we all expect that it will contain  
14 failure-to-warn opinions against Depuy.  
15

16 This is not good-faith litigation; this is  
17 plaintiffs trying to undo expert discovery because they  
18 believe that Depuy is about to prevail on summary judgment.  
19 And our motion's been pending for several months. The  
20 aggressive tactics that plaintiffs have displayed in this  
21 lawsuit reached new heights last week when the Rouvieres  
22 informed us that they intend to file a lawsuit against our  
23 firms, against Howmedica and against the Gibbons paralegal  
24 that you mentioned earlier. Plaintiffs don't address any  
25 of the engineering expert issues in their reply. We

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2 anticipate and -- but they apparently don't want to waive  
3 them, either. The rest of it's in the papers, your Honor,  
4 but I just wanted to make sure that I made that clear  
5 during oral argument. Thank you.

6 THE COURT: All right. So I thank everyone for  
7 the submissions, the argument. I will issue a written  
8 opinion and order if not this evening then tomorrow. I  
9 thank everyone for their time. And this matter is  
10 adjourned. Thank you.

11 MS. VISCONTI: Your Honor, if I may? This is --  
12 hello?

13 THE COURT: Is that you, Ms. Visconti?

14 MS. VISCONTI: Yes. But I don't know if everybody  
15 else just left the line.

16 THE COURT: Yes. Hold on. Do we have Howmedica's  
17 counsel on the line?

18 MR. ASFENDIS: Yes, I'm still here.

19 THE COURT: Do we have Depuy's counsel on the  
20 line?:

21 MR. LARSON: I'm still here.

22 THE COURT: Okay. Very, very briefly,  
23 Ms. Visconti. Go ahead.

24 MS. VISCONTI: Thank you. I just want to say  
25 that, as I said in my papers, I really don't appreciate

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1 the -- I don't think it's necessary to have the personal  
2 attacks against Ms. Visconti asking to do all these things.  
3 So I want to make it clear we are not asking to reopen all  
4 of the expert discovery. What we're asking for is very  
5 clear in our papers. We just want to be able to submit  
6 this opinion, and we think that sanctions are warranted. I  
7 don't know why there was a whole argument about the other  
8 pending motions; I'm not going to address that. But,  
9 again, just so that it's clear, we're not asking to reopen  
10 all of the expert discovery in this case; we're just asking  
11 if we can use Dr. Gannon's report and let everybody else  
12 rely on it without objection. And, yes, absolutely,  
13 sanctions are warranted in this case. That's it. Thank  
14 you very much, your Honor. I appreciate the time.

16 THE COURT: All right. All right, thank you.  
17 This matter is adjourned.

18 (Whereupon, the matter is adjourned.)  
19  
20  
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22  
23  
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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Rouviere et al v. Depuy Orthopaedics, Inc. et al, Docket #18-cv-04814-LJL-SDA, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature *Carole Ludwig*

Carole Ludwig

Date: May 5, 2021